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No. 04-629

In the Supreme Court of the United States

PETE K. RAHN, DIRECTOR OF THE MISSOURI DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

v.

THOMAS ROBB, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF TEXAS, ALABAMA, ARKANSAS, HAWAII, ILLINOIS, KANSAS, MARYLAND, OKLAHOMA, PENNSYLVANIA, PUERTO RICO, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Is a state-made, state-erected, state-owned, and state-maintained highway sign acknowledging the assistance of an organization that volunteers to pick up litter the speech of the State, and therefore not subject to First Amendment restrictions that would apply were it speech of the organization?

2. In deciding whether a particular organization can participate in a volunteer litter pick-up program, may the State take into account problems from a sign acknowledging that organization's participation, such as the danger of inducing litter, or endangering highway workers and others who are perceived by passers-by to be organization members?

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INTEREST OF *AMICI CURIAE*

The state *amici curiae*, through their Attorneys General, respectfully submit this brief in support of the petition for writ of certiorari. Nearly every State uses some type of "Adopt-a-Highway" program because they enable road clean-up to be conducted in a cost-efficient manner, relying on community spirit instead of tax dollars.[1] Through Adopt-a-Highway programs, States are able to maintain clean public roadways and save millions of taxpayer dollars annually.

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1. Forty-nine States have an Adopt-a-Highway program. *See* OKLAHOMA DEPARTMENT OF TRANSPORTATION, ADOPT-A-HIGHWAY NATIONAL INFORMATION, *at* http://www.okladot.state.ok.us/public-info/beauty/aahinfo.htm (last visited Dec. 7, 2004) (indicating Oklahoma's 1999 national Adopt-a-Highway survey showed forty-eight states—all but Maine and Vermont—had developed a program); MAINE DEPARTMENT OF TRANSPORTATION, ADOPT-A-HIGHWAY PROGRAM, *at* http://www.maine.gov/mdot/community-programs/aah-program.php (last visited Dec. 7, 2004) (Maine announced it had become the forty-ninth State to implement an Adopt-a-Highway program). The majority of the States that have implemented these programs have done so without statutes or regulations that explicitly govern an Adopt-a-Highway program. Sixteen States, however, have passed statutes or regulations, or both, that formalize the creation of a program. *See* CONN. GEN. STAT. §13a-97b; FLA. STAT. §403.4131; 605 ILL. COMP. STAT. 120/1 et seq.; LA. REV. STAT. ANN. §30:2534; ME. REV. STAT. ANN. tit. 23, §1117; N.H. REV. STAT. ANN. §230:83; N.J. STAT. ANN. §13:1E-217; N.Y. TRANSP. LAW §14; N.C. GEN. STAT. §136-140.1; OR. REV. STAT. §366.158; WASH. REV. CODE §47.40.100; CONN. AGENCIES REGS. §13a-97b-1 et seq.; IOWA ADMIN. CODE r.761-121.1(307) et seq.; CODE ME. R. §17-229 Ch. 207; CODE MISS. R. 27.000.008; MO. CODE REGS. ANN. tit. 7, §10-14.010 et seq.; N.H. CODE ADMIN. R. ANN. TRA. 308.01 et seq.; N.C. ADMIN. CODE tit. 19A, r.2D.1001 et seq.; OR. ADMIN. R. 734-029-0005 et seq.; 43 TEX. ADMIN. CODE §2.63; UTAH ADMIN. CODE 918-4; WASH. ADMIN. CODE §468-72-010 et seq.

The court of appeals's ruling requiring the State of Missouri to allow the Ku Klux Klan to participate in its Adopt-a-Highway program jeopardizes the future of all such Adopt-a-Highway programs. Refusing the Ku Klux Klan's Adopt-a-Highway application does not infringe on any of the Klan's constitutional rights. The Klan remains free to speak on its own, but nothing in the First Amendment requires the States to administer their Adopt-a-Highway programs in such a way as to partner with or otherwise endorse the Klan. The Klan has a shameful history of bigotry and violence, and the States are rightly united in emphatically rejecting the Klan's message of hate.

Additionally, this case provides the Court with an opportunity to clarify the "government speech" doctrine, which remains without a clear standard. The *amici* States therefore ask the Court to grant the petition and resolve the uncertainty surrounding the States' ability to speak.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit erred by holding that the State of Missouri violated the First Amendment rights of the Ku Klux Klan when it refused to enroll the Klan in Missouri's Adopt-a-Highway program. *Robb v. Hungerbeeler*, 370 F.3d 735 (CA8 2004). The court of appeals's holding is based on the erroneous premise that participation in the program—and the State's recognition of participants through highway signs—is protected expression. Under this Court's First Amendment precedents, Adopt-a-Highway programs involve only government speech. As the speaker, a State may articulate its own message, and is not compelled to embrace—either explicitly or implicitly—the views of private groups, like the Klan, that espouse views anathema to the values the State chooses to advance in its role as speaker. Accordingly, States violate no First Amendment rights in denying the Klan's participation in the program.

The Eighth Circuit's ruling demonstrates the need for greater clarity in the government speech doctrine. *See, e.g., Sons of Confederate Veterans, Inc. v. Comm'r Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (CA4 2002) (stating that "[n]o clear standard has yet been enunciated . . . by the Supreme Court for determining when the government is 'speaking' and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so"), *en banc reh'g denied*, 305 F.3d 241, 245 (CA4 2002) (Luttig, J., respecting denial of rehearing en banc) (stating the government-speech doctrine is "in its formative stages" and remains "neither extensively nor finely developed"); *Wells v. City & County of Denver*, 257 F.3d 1132, 1140 (CA10 2001) ("The Supreme Court has provided very little guidance as to what constitutes government speech."), *cert. denied*, 534 U.S. 997 (2001). This case provides the Court an appropriate vehicle to examine the government speech doctrine and to articulate a clear standard.

Additionally, *Hungerbeeler* puts the Eighth Circuit in conflict with the Fifth Circuit's decision in *Texas v. Knights of the Ku Klux Klan*, which held that Texas was permitted to exclude the Ku Klux Klan from its Adopt-a-Highway program. 58 F.3d 1075, 1079-81 (CA5 1995) (holding that an Adopt-a-Highway program was a nonpublic forum and upholding Texas' refusal to allow Klan participation as reasonable and viewpoint-neutral). The circuit conflict over whether a State may refuse the Klan's participation in the Adopt-a-Highway program warrants this Court's review.

Finally, as Justice Thomas powerfully observed last year:

> "'The world's oldest, most persistent terrorist organization is not European or even Middle Eastern in origin. Fifty years before the Irish Republican Army was organized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing, and murdering in the

> United States. Today . . . its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States.'"

Virginia v. Black, 538 U.S. 343, 388-89 (2003) (Thomas, J., dissenting) (quoting M. NEWTON & J. NEWTON, THE KU KLUX KLAN: AN ENCYCLOPEDIA vii (1991)).

For a Nation founded on the revolutionary predicate that "all men are created equal," nothing could be more noxious than forcing the government to partner with those who preach racism and oppression. No African-American citizen of a State—and indeed no citizen of any race—should ever be driving on a public road and be confronted with a state sign, sponsored by his own government, endorsing, heralding, or thanking the Klan. The First Amendment allows the Klan to speak on its own, but nothing in our Constitution compels the government to join forces—either explicitly or implicitly—with that contemptible group. The Court should grant the petition and reverse the court of appeals's decision to the contrary.

I. BECAUSE THE ADOPT-A-HIGHWAY PROGRAM IMPLICATES ONLY GOVERNMENT SPEECH, STATES ARE NOT REQUIRED TO REMAIN VIEWPOINT-NEUTRAL WHEN ACCEPTING APPLICATIONS TO THE PROGRAM.

When the government is the speaker, it may convey messages of its own choosing, while refusing to convey the messages of others. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[W]hen the State is the speaker, it may make content-based choices."). Although the First Amendment constrains a State from restricting the protected speech of private groups, a State is not required to embrace any particular group's message as its own or refrain from expressing disagreement with views that conflict with the State's own policy choices. *See id.; see also Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412

U.S. 94, 139 & n.7 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression.").

Contrary to the court of appeals's conclusion, Missouri's Adopt-a-Highway program does not constitute private speech. The only speech is that of the State in acknowledging program participants. The Court's review is warranted to address the question of whether a sign that is made, owned, and maintained by the State to recognize voluntary participants in an Adopt-a-Highway program should be construed as the speech of those *being* thanked. *Amici* States urge the Court to hold it cannot.

A. When the Government Speaks, it May Elect to Articulate Certain Views and Refuse Others.

Any legislative body inherently makes value judgments when choosing which bills to pass and which programs to fund. Indeed, the very purpose of elective democracy is for the people to choose which representatives, and which underlying policies and value judgements, should guide the State. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1999) (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view on . . . innumerable subjects."). So too must the government make value judgments when it speaks.

The State "is entitled to say what it wishes." *Rosenberger*, 515 U.S., at 833. The Constitution does not constrain a State from articulating one idea or refusing to espouse another. In articulating its message, the government may speak on its own or through others, and when it is the government's message that is being expressed, viewpoint-based discrimination is permitted. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001); *see also Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (noting that viewpoint-based funding decisions can be made when the government itself is the speaker.); *Rosenberger*, 515 U.S.,

at 833 (stating that viewpoint-based decisions are permitted when the government expresses its message through the use of private entities). When the government speaks, "the government can speak for itself." *Southworth*, 529 U.S., at 229.

When the message to be conveyed belongs to the government, the government "may regulate the content of what is or is not expressed." *Rosenberger*, 515 U.S., at 833. Under these principles, any speech undertaken by Missouri under its Adopt-a-Highway program may selectively articulate Missouri's chosen message. Missouri may choose to express gratitude to community groups for their participation in the program without being forced to speak on behalf of groups it does not choose to promote. The First Amendment allows the Klan to engage in its own expressive activities, but it does not require Missouri to speak on the Klan's behalf. Accordingly, Missouri may choose not to engage in a civic partnership with the Klan when to do so would implicitly and erroneously signal the State's approval of a racist viewpoint that is integral to the Klan's identity but odious to the State.

Additionally, a State should be allowed to protect its message from those who would attempt to corrupt it. By taking steps to ensure that the message presented is exactly the message the State desires to present, a state speaker does not violate the First Amendment rights of those who wish the State would articulate a different message. *Cf. Rosenberger*, 515 U.S., at 833 (stating that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee"). The same principle assures that a State may also take the appropriate steps to protect its message when the State itself speaks. In choosing not to promote the Ku Klux Klan, Missouri merely ensures that its governmental message does not get trampled by the Klan's message of violence, hate, and segregation.

B. Missouri's Adopt-a-Highway Program Involves Only Government Speech.

1. The Only Speech Component in the Adopt-a-Highway Program is the "Thank You" Sign.

While acknowledging that vital aspects of the Adopt-a-Highway program are state speech, the court of appeals opined that this "does not eviscerate the expressive element of the adopter's election to participate in the program." *Hungerbeeler*, 370 F.3d, at 745. The Eighth Circuit's theory, however, rests on the flawed assumption that merely participating in an Adopt-a-Highway program constitutes expressive conduct protected under the First Amendment.

The court of appeals concluded that "taking part in the [Adopt-a-Highway] program, and receiving the attendant recognition on the signs, is 'sufficiently imbued with elements of communication' to constitute a form of private expressive conduct." *Id.*, at 744-45 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974))[2]. The Court in *Spence* acknowledged, however, that "we cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.*, at 409 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). The court of appeals's view that the Ku Klux Klan engages in expressive conduct merely by

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2. In *Spence*, the Court held that a publicly displayed American flag, hung upside down with a peace symbol affixed, was expression protected by the First Amendment. 418 U.S., at 405-06. The display, hung "as a protest against the invasion of Cambodia and the killings at Kent State University," was intended "to associate the American flag with peace instead of war and violence." *Id.*, at 408. By contrast, the Klan can identify no speech or expression of its own making that Missouri has suppressed in this case.

participating in the Adopt-a-Highway program does not withstand scrutiny.

The two activities in which Adopt-a-Highway participants engage in—and which the Eighth Circuit concludes constitute protected speech—are picking up trash on the highway and having the State speak favorably about the adopting group. Under even the broadest of interpretations, the act of picking up highway litter pursuant to an Adopt-a-Highway program is not expressive conduct. Nor should the participant's expectation—real or imagined—of receiving public acknowledgment change this result. Protected expression, whether verbal or non-verbal, requires *the speaker* to articulate an idea of some kind. *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."). The mere act of participating in an Adopt-a-Highway program does not meet that threshold.[3]

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3. Although the court of appeals did not squarely address whether the Adopt-a-Highway program constituted a public forum, *Hungerbeeler*, 370 F.3d, at 744-45, this Court's precedents compel the conclusion that an Adopt-a-Highway program is not a public forum. Property such as public streets or parks are considered public fora because they have traditionally been "devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983) (citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)). In contrast, the Adopt-a-Highway program, with its sole purpose being trash clean-up, cannot be said to have been "'used for purposes of assembly, communicating thoughts between citizens, [or] discussing public questions.'" *Ibid.* The program is therefore not a traditional public forum.

Nor is it a "limited" or "designated" public forum. *See Rosenberger*, 515 U.S., at 678 (finding a university created a limited public forum by

In making its determination that the Klan had a First Amendment right to participate in Missouri's Adopt-a-Highway program, the court of appeals compared participation in the program with the expressive nature of participation in a parade. *Hungerbeeler*, 370 F.3d, at 744 (*citing Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 569-70 (1995)). This comparison overstates the expressive aspect of the Adopt-a-Highway program by ignoring the significant difference between a privately-sponsored parade and a state public works program.

A parade is a purely expressive activity, organized for the explicit purpose of demonstrating a particular viewpoint to the viewing public. *See Hurley*, 515 U.S., at 568 ("[W]e use the word 'parade' to indicate marchers who are making some sort of collective point."). The Adopt-a-Highway program was expressly designed for the sole purpose of collecting roadside litter, not for expressing any viewpoint. MO. CODE REGS., tit. 7, § 10-14.010

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allowing registered student groups access to student activities fund); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (describing a designated public forum as "property that the State has opened for expressive activity by part or all of the public"). Limited or designated public fora are "created by government designation of a place or channel of communication," *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985), and "may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects," *Perry*, 460 U.S., at 46 n.7. Missouri expressly rejected the notion that the Adopt-a-Highway program was created as a forum for expression. MO. CODE REGS., tit. 7, § 10-14.010 (Pet'r App. A-50) ("The program is not intended as a means of providing a public forum for the participants to use in promoting name recognition or political causes."). The Adopt-a-Highway program is therefore neither a "limited" public forum nor a "designated" public forum.

(Pet'r App. A-50) ("The program is not intended as a means of providing a public forum for the participants to use in promoting name recognition or political causes."). Rather, it was implemented to provide the State with an economically efficient way to clean the highways. *Ibid.* The Adopt-a-Highway program does not involve expression of an individual participant's viewpoint, either in theory or in practice.

Whereas a parade's success may be evaluated based on the expressive activity demonstrated therein and the number of people who observe it, the Adopt-a-Highway program's success is measured by the miles of highway cleaned and the amount of money saved by the State. Missouri's Adopt-a-Highway program has no expressive purpose and contains no element of private expression; the Klan cannot change this reality merely by proclaiming its own intent to express a message. *See Spence*, 418 U.S., at 409. The court of appeals's decision to the contrary allows the Klan to hold Missouri hostage to its views by cloaking litter clean-up in the guise of an expressive activity.

An organization's participation in a parade constitutes expressive activity because the parade is expressive activity. In contrast, participation in the Adopt-a-Highway program does not constitute expressive activity because the collection of roadside trash does not involve speech or other advocacy of a viewpoint. Any expressive activity is entirely ancillary to the purpose of the program. Because participation in an Adopt-a-Highway program is not private expressive activity, the First Amendment does not require Missouri to allow the Ku Klux Klan to participate.

2. The State "Thank You" Signs are Government Speech.

Properly analyzed, the only speech component in Missouri's Adopt-a-Highway program consists of the signs placed on the highway by the State to recognize the contributions of the volunteer

organizations. The State designs the signs, pays for their production and placement, and directs their location. MO. CODE REGS., tit. 7, § 10-14.050 (Pet'r App. A-62). The signs are wholly governmental speech. Under this Court's precedents, a street sign erected by the State to articulate a state-specified message should be viewed as government speech. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000) (holding that invocations delivered by a student chosen through a school election remained government speech under the Establishment Clause because they were "subject to particular regulations that confine the content and topic of the student's message"); *Velazquez*, 531 U.S., at 541-42 (contrasting a program "where the government's own message is being delivered" with a program "designed to facilitate private speech"); *Southworth*, 529 U.S., at 229 (suggesting that a university program designed "to advance a particular message," and over which the university was "responsible for [the] content," would be government speech).

The State of Missouri retains complete control over the design, manufacture, and placement of the signs. MO. CODE REGS., tit. 7, § 10-14.050 (Pet'r App. A-62). The signs merely thank the organization that has adopted that section of the highway; the organization has no discretion over the sign's content, and organizational slogans, logos, and addresses are prohibited. Pet., at 22 (citing MO. CODE REGS., tit. 7, § 10-14.050 (Pet'r App. A-62)). These regulations ensure that there is no speech component to the signs other than the State's expression of thanks.

When confronted with the issue of a similar governmental sign expressing gratitude or recognition, the Tenth Circuit held the sign to be the government's speech. *Wells v. City & County of Denver*, 257 F.3d 1132 (CA10 2001).[4] The Tenth Circuit looked to three

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4. In *Wells*, the Tenth Circuit held a sign erected by the City of Denver thanking the corporate sponsors of the City's holiday display was

factors in its analysis: (1) the purpose of the sign was to express thanks, and the benefit derived by those thanked did not change the government's purpose; (2) the sign was "built, paid for, and erected" by the government, and those being thanked had "no editorial control over [the sign's] design or content; and (3) the government retained responsibility for the security of the sign. *Id.*, at 1141-42. Analysis of Missouri's Adopt-a-Highway signs under these factors yields the same result: a governmental sign expressing thanks is purely government speech.

A message of thanks is not customarily viewed as the speech of the party *being* thanked. For example, if Missouri articulated its thanks by mailing a plaque to the organization or issuing a proclamation, there is little question that such a gesture by the State would constitute state speech. Nor does the public nature of the acknowledgment alter the character of the speech or the speaker. The acknowledgment remains Missouri's speech. Though a public expression of thanks may be more desirable to the recipient than a private one, both are the speech of the one *giving* the thanks, not the one *receiving* the thanks.

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government speech. *Wells*, 257 F.3d, at 1142. The court further stated Denver could refuse a private group's request to include its own message alongside that of the City. *Id.*, at 1143 (stating that Denver could articulate its message "without incurring a constitutional obligation to incorporate the message of any private party with something to say. 'Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist.'").

C. The Government Speech Component is the Very Reason the Ku Klux Klan Wants to Participate in the Adopt-a-Highway Program.

The Ku Klux Klan recognizes that any state message of support would prove immeasurably more effective than the Klan's own speech in promoting the Klan as an acceptable member of the community. The Klan does not seek to participate in the Adopt-a-Highway program out of a desire to articulate a message of "solidarity with the community and their wish to become known as promoters of clean highways," as the Eighth Circuit suggests. *Hungerbeeler*, 370 F.3d, at 745. Instead, it is the Klan's desire to force the State of Missouri to publically express gratitude for the Klan's participation—thereby implicitly sending a state message of support and acceptance of the Ku Klux Klan—that provides Respondents' motivation to join the Adopt-a-Highway program. The Klan is well aware of the public's perception of its message and the reality that state-articulated support for the Klan's work in the community would be far more effective than any statement the Klan could make on its own behalf. It is the promise of a public "thank you" from the State—which would be likely to create the mistaken impression that the State approves of the Ku Klux Klan's racist message—that motivates the Klan to attempt to adopt a highway.

Missouri's choice to exclude the Klan from participating in its Adopt-a-Highway program does not infringe on the Klan's ability to exercise whatever speech rights it possesses on its own with regard to state highways. The Klan remains free to purchase billboard space to articulate a message of dedication to litter prevention or otherwise protecting the environment. The Klan may pick up trash on its own to the extent any other citizen or group may do so. And the fact that the Klan may not "adopt" a section of highway does not preclude it from organizing and speaking—just as any other citizen may—in public places. Missouri merely

refuses to partner with the Klan and accord it approved status as a welcome member of society when the Klan's violent history and racist message are antithetical to the values the State seeks to promote. Because Missouri is not preventing the Klan from speaking—but is instead merely refusing to participate in the Klan's efforts to improve its own public image through an erroneous, implicit endorsement by the State—no First Amendment right of the Klan has been violated.

D. Missouri's Refusal to Promote Hate Groups is Wholly Consistent with the Government's Right to Speak on Behalf of Those Ideals it Chooses to Promote.

Although private entities may engage in speech advocating racist ideals, the First Amendment does not require a State to support such speech or tacitly approve such messages. Missouri may refuse to promote the Ku Klux Klan because the Klan's segregationist message, as well as the associated violence that has long been the Klan's history, is not a message the State of Missouri chooses as its own.

The court of appeals cited *Healy v. James*, 408 U.S. 169, 186 (1972), which stated that "guilt by association alone, without establishing that an individual's association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights." Therefore, the court concluded, Missouri had improperly denied Unit 188 of the Klan from participating in the Adopt-a-Highway program absent evidence that any member of that particular unit of the Klan had a "history of violence." *Hungerbeeler*, 370 F.3d, at 742. But the court of appeals's analysis wrongly presumes that Missouri has interfered with the unit's First Amendment rights in some way.

Missouri has not infringed on any First Amendment right held by Unit 188 merely by declining to partner with the unit in the Adopt-a-Highway program. Missouri acts reasonably, and within

the bounds of the First Amendment, when it refuses to speak on behalf of a group that chooses to associate itself with the Ku Klux Klan. To the extent Unit 188 wishes to distinguish itself from the Klan's history of violence, it is free to do so. It may give public speeches, hold demonstrations, or purchase billboard advertisements. Missouri has not prevented Unit 188 from exercising its First Amendment right of expression in an attempt to change the community's perception of the organization. Missouri has merely declined to aid in sponsoring the unit's message.

Government speech is not directly constrained by the First Amendment, yet the government is not unrestrained. The government is accountable to the people. *See Southworth*, 529 U.S., at 235 (observing that "when the government speaks . . . to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy"). Government speakers must take care to articulate a message the public will support, otherwise they will face the possibility of losing public office. Therefore, forcing a State to speak on behalf of an organization whose ideals the State opposes impairs the State's ability to speak and disserves its citizens. Nothing in the First Amendment requires the State to speak on behalf of, and publicly endorse, The Ku Klux Klan and its more than a century of violence, intimidation, and racism.

II. MISSOURI IS NOT REQUIRED TO IGNORE THE KLAN'S UNIQUE HISTORY OF HATE, INTIMIDATION, AND VIOLENCE.

Official acknowledgment of the Klan's violent nature came soon after the formation of the Klan during Reconstruction. The Klan "imposed a veritable reign of terror throughout the South" in an effort to curb the reforms of the Reconstruction era. *Virginia v. Black*, 538 U.S. 343, 352-53 (2003) (citation omitted). Both the Federal government and individual States responded to the Klan's violent attempts to carry out an ideology of hate and segregation.

The growing violence following Reconstruction prompted President Grant to request Congress to act, stating the Ku Klux Klan had "rendered life and property [in the South] insecure." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 722 (1989).[5] Congress responded with what has become known as the Ku Klux Klan Act, which curbed Klan activities in the South, and the first Klan had dissipated by the end of Reconstruction, only to return again by 1915. *Black*, 538 U.S., at 353-54.

The belief system of the Klan had not changed much, as one Klan publication illustrates: "We avow the distinction between the races, . . . and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in any and all things." *Id.*, at 354 (citation omitted). Within the first six years of the reimergence of the Ku Klux Klan, 152 separate acts of violence, including four murders, had been documented. *Ibid.* Throughout the twentieth century, public perception of the Ku Klux Klan has continued to be shaped by images of Klan violence and intimidation.

Recent decisions by this Court reflect that the Klan still endorses an ideology of racism and promotes its views through violence and intimidation. The Klan has continued to burn crosses as a "'symbol of hate,'" often intending the burning cross to send a "message of intimidation, designed to inspire in the victim a fear of bodily harm" *Id.*, at 357 (quoting *Capitol Square Review &*

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5. President Grant summed up the Klan's mission: "by force and terror to prevent all political action not in accord with the views of the members . . . and to reduce [black citizens] to a condition closely allied to that of slavery." President Ulysses S. Grant, Message to Congress (Apr. 19, 1872), *published in* H.R.J., 42d Cong., 2d Sess. 715, 716 (1872).

Advisory Bd. v. Pinette, 515 U.S. 753, 771 (1995)).[6] Because the Klan's mission and values have remained the same, its public image has rightly not improved.

Finally, courts have routinely taken judicial notice of the Ku Klux Klan's unique history of violence. In *NAACP v. Alabama ex rel. Patterson*, the Court explained its decision in *People of the State of New York ex. rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928), as resulting from "the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice." *NAACP*, 357 U.S. 449, 465 (1958). *See also NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 310 (1964); *Marshall v. Bramer*, 110 F.R.D. 232, 235-36 (W.D. Ky. 1985); *United Klans of America v. McGovern*; 453 F.Supp. 836, 840 (N.D. Ala. 1978); *United States v. Crenshaw County Unit of United Klans of America*, 290 F.Supp. 181, 182 (M.D. Ala. 1968); *Cox v. State*, 585 So.2d 182, 205 (Ala.Crim.App. 1991).

The State of Missouri is wholly justified in taking the Klan's well-publicized history of violence into account in declining the local Klan unit's offer to participate in the Adopt-a-Highway program. The Klan has, for more than a century, been consistent in its message of hate and racial segregation and has used all manner of violence to promote this message. Missouri need not ignore the

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6. *See also United States v. Guest*, 383 U.S. 745, 747-48 (1966) (quoting an indictment of a Klan member for "shooting," "beating," and "killing" black people; "damaging and destroying property;" and "threatening [blacks] with guns"); *United States v. McDermott*, 29 F.3d 404, 405 (CA8, 1994) (describing Klansmen "waving baseball bats, axe handles, and knives; throwing rocks and bottles; veering cars toward black persons; and physically chasing black persons" in an attempt to keep them from using a public park).

Klan's violence, nor the effects that knowledge of this history continues to have on the State's citizens. Because Missouri does not infringe on any of the Klan's First Amendment rights in denying their participation in the program, the State's refusal to promote the Ku Klux Klan on a state sign is a constitutional use of government speech.

III. STATES WILL BE HARMED IF REQUIRED TO PROMOTE THE KU KLUX KLAN AS A PARTNER OF THE STATE.

Missouri has documented various safety problems that would arise if the Klan were allowed to "adopt" a highway. Pet., at 30-32. Protecting state employees, and indeed members of the Klan themselves who might adopt the highway, from potential harassment or violence matters greatly to Missouri and other States with Adopt-a-Highway programs. The harms set out in the Petition are not, however, the only cause for concern. In addition to the potential physical harms to people picking up trash along the road, requiring Klan participation in Adopt-a-Highway programs could well trigger the demise of the programs themselves.

If Missouri is required to partner with the Klan, other Adopt-a-Highway participants may quit the program out of distaste for the Klan's message or fear that the public will associate them with the Ku Klux Klan. Similarly, the forced inclusion of the Ku Klux Klan would likely lead to fewer new Adopt-a-Highway applicants. The net result could be many fewer highway adopters and many fewer miles of the highways adopted. The First Amendment does not compel this result.

Indeed, some States might be forced to take the more drastic measure of disbanding their Adopt-a-Highway programs altogether, rather than becoming—or being viewed as being—sympathetic to the Klan's views. For States that simply are not willing to partner with the Ku Klux Klan under any circumstances, the only alternative would be to eliminate the Adopt-a-Highway program

and forgo the economic benefits of having volunteers pick up tons of roadside trash each year. The Klan should not be allowed to hold States hostage to such a choice. A State should not be required to choose between implicitly articulating a positive message about the Klan and forfeiting the millions of tax dollars saved annually through Adopt-a-Highway programs.

Finally, there is likely to be considerable and justified unrest in communities if citizens believe that their government has chosen to promote a message embracing the Klan. The Klan's history of violence makes it a group with little public respect or sympathy. Missouri has no intention of promoting the Klan in any capacity, and the State's choice in this matter should be respected. The First Amendment does not compel the State to endorse, in any way, the Ku Klux Klan.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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